

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

LEO K. HOLLOWAY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:12CV372-HEH
)	
DOCTOR TESEMMA,)	
)	
Defendant.)	

MEMORANDUM OPINION
(Denying Motion to Dismiss and Providing Notice of Conversion)

Leo K. Holloway, a Virginia inmate proceeding *pro se* and *in forma pauperis*, filed this 42 U.S.C. § 1983 action. By Memorandum Order entered March 11, 2013, the Court directed service on Defendant Tesemma. Defendant Tesemma has filed a Motion to Dismiss arguing that Holloway failed to exhaust his administrative remedies and his claim fails to state a claim for relief. The Memorandum in Support of the Motion to Dismiss is accompanied by a Declaration of Ben-Hur Soloria, the Health Services Administrator for St. Brides Correctional Center and a copy of Virginia Department of Corrections Operating Procedure No. 866.1 (ECF No. 13-1).

The Federal Rules of Civil Procedure provide that, if matters outside the pleadings “are presented to and not excluded by the court” in conjunction with a Federal Rule of Civil Procedure 12(b)(6) motion, “the motion must be treated as one for summary judgment under Rule 56.” *See* Fed. R. Civ. P. 12(d). Accordingly, Defendant Tessema’s Motion to Dismiss (ECF No. 12) will be denied. As the Court intends to convert the Motion to Dismiss to a motion made under Fed. R. Civ. P. 56, Holloway is entitled to “a

reasonable opportunity' to present material that is relevant to a converted motion to dismiss." *Tuttle v. McHugh*, 457 F. App'x 234, 235–36 (4th Cir. 2011) (quoting Fed. R. Civ. P. 12(d); *Fayetteville Investors v. Comm'l Builders, Inc.*, 936 F.2d 1462, 1471–72 (4th Cir. 1991)).

In accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Holloway is advised that he is entitled to file a reply opposing the Motion for Summary Judgment that includes counter-affidavits, statements, exhibits, or other legal or factual material that supports his position in the case.¹ In addition to such material, Holloway is entitled to file a legal brief in opposition to the one filed by Defendant.

Holloway is further advised that if he does not reply to the Motion for Summary Judgment filed by Defendant Tesemma and send a complete copy of his reply to counsel for the Defendant Tesemma, the Court will decide the motion on the papers already filed by Holloway and counsel for Defendant Tesemma. A decision favoring Defendant Tesemma would result in the dismissal of his complaint.

An appropriate order will accompany this Memorandum Opinion.

Date: Oct 25, 2013
Richmond, Virginia

HEH /s/
HENRY E. HUDSON
UNITED STATES DISTRICT JUDGE

¹ An affidavit is a sworn statement of facts made on personal knowledge, and affidavits may be submitted by Holloway or any other witnesses. There are two alternative ways to submit an affidavit to the Court, one of which must be followed. One way is for the person making the affidavit to sign the affidavit and swear to the truth before a notary public. The other way, which does not require a notary public, is for the person making the affidavit to sign the affidavit and certify that he signs under penalty of perjury and understands that he may be prosecuted if the facts he sets forth are untrue.